No. 78574-1

THE SUPREME COURT
STATE OF WASHINGTON

CLERK

COWLES PUBLISHING COMPANY, a Washington corporation,

Petitioner,

v.

CODY SOTER, a minor child; FRANCIS SOTER and GLENDA CARR, individually, and as parents of CODY SOTER; THE ESTATE OF NATHAN WALTERS, a deceased minor child; RICK WALTERS and TERESA WALTERS, a deceased minor child; and SPOKANE SCHOOL DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

BRIEF OF *AMICI CURIAE* THE WASHINGTON SCHOOLS RISK MANAGEMENT POOL, THE WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, THE SOUTHWEST WASHINGTON RISK MANAGEMENT INSURANCE COOPERATIVE, THE WASHINGTON COUNCIL OF SCHOOL ATTORNEYS, THE WASHINGTON COUNTIES RISK POOL, THE ASSOCIATION OF WASHINGTON CITIES, THE ASSOCIATION OF WASHINGTON CITIES RISK MANAGEMENT SERVICE AGENCY, THE WASHINGTON CITIES INSURANCE AUTHORITY, THE WATER & SEWER RISK MANAGEMENT POOL, THE PUBLIC UTILITY RISK MANAGEMENT SERVICES SELF INSURANCE FUND, AND THE WASHINGTON GOVERNMENTAL ENTITY POOL IN SUPPORT OF RESPONDENT SPOKANE SCHOOL DISTRICT NO. 81

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
(206) 623-7580

Grace T. Yuan, WSBA # 20611
Laura K. Clinton, WSBA # 29846

Attorneys for Amici Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

I. INTRODUCTION

A public agency is entitled to prepare for litigation while protecting its work product from disclosure. The trial court's ruling and the Court of Appeals opinion appropriately recognized that Washington's public agencies are entitled to candid legal advice and that their work product is exempt under the Public Records Act, RCW 42.56.010, *et seq.* (commonly known as the "PDA"). The decision below should be affirmed.

II. IDENTITY AND INTEREST OF AMICI

Collectively, Amici represent the interests of every school district in Washington, every Washington city and town, many counties, and a wide range of special purpose districts and interlocal entities.

The **Washington Schools Risk Management Pool** ("WSRMP") is a self-funded group with 75 members, comprising school districts, educational service districts, and interlocal cooperatives in Washington that pool their resources to prevent, control, and pay for liability and property risks. WSRMP retains attorneys to represent its members as part of its extensive pre-claim program, as well as when they are threatened with suit or sued.

The **Washington Association of School Administrators** ("WASA") is a statewide professional association with more than 1,040

members, including 290 school superintendents and 750 administrators in 296 school districts, educational service districts, and other educational entities. WASA works with legal counsel as needed to assist its members in obtaining appropriate legal advice and consultation.

The **Southwest Washington Risk Management Insurance Cooperative** ("SWRMIC") is a public entity risk pool with 33 members, including school districts, school district cooperatives, and an educational service district. SWRMIC provides property and casualty insurance coverage to its members and retains attorneys for pre-loss investigation, case evaluation, and representation of its members in litigation.

The **Washington Council of School Attorneys** ("WCSA") is a non-profit association of approximately 100 attorneys who provide legal advice and representation to Washington's 296 school districts. WCSA members commonly advise and defend school districts, school board members, and school administrators.

The **Washington Counties Risk Pool** ("WCRP") provides its member counties with joint self-insurance coverage for bodily injury, personal injury, property damage, errors and omissions, and advertising injury. There are 28 member counties in WCRP receiving third-party liability coverage. WCRP regularly retains attorneys to assist members with handling claims and litigation defense.

The **Association of Washington Cities** ("AWC") is a private, non-profit, non-partisan corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch, and regulatory agencies. All of Washington's 281 cities and towns are AWC members. AWC provides legislative representation, training, and technical assistance to its members.

The **Association of Washington Cities Risk Management Service Agency** ("AWC RMSA") is a self-funded risk sharing pool that AWC organized to provide its member cities with an option for group pooling for insurance as an alternative to traditional private market insurance. There are 82 cities and towns and one park district in AWC RMSA. AWC RMSA offers coverage for a wide range of losses, including property, liability, elected officials errors and omissions, employee fidelity/bonds, boiler and machinery, and airport. AWC RMSA retains attorneys to represent its members, investigate incidents related to possible claims, and prepare for potential litigation.

The **Washington Cities Insurance Authority** ("WCIA") is a municipal risk pool whose 124 members include diverse government agencies such as cities, special purpose districts, and interlocal agencies. WCIA provides its membership with a "Pre-Defense Review" program that positions members for anticipated litigation by assisting with pre-loss

investigation and legal analysis of potential tort claims. WCIA retains attorneys to defend its members on a variety of matters, such as police conduct issues, land use issues, and employment matters.

The **Water & Sewer Risk Management Pool** ("WSRP") insures water and sewer districts and provides them with loss prevention and other training. WSRP has 64 water and sewer district members. WSRP hires claims attorneys for its members. WSRP also provides pre-litigation legal counseling to member districts. Most of WSRP's litigation involves sewer backups, water line breaks, personnel matters, or auto issues.

The **Public Utility Risk Management Services Self Insurance Fund** ("PURM") is a self-insurance pool with 19 members, comprising electric, water, and sewer public utility districts and one telecommunications entity. PURM retains attorneys to counsel its members on legal issues, chiefly employment matters, and to assist in evaluating and defending potential litigation.

The **Washington Governmental Entity Pool** ("WGEP") is an unincorporated, not-for-profit, local government risk sharing pool that provides property and liability insurance coverage to its members. WGEP has 420 members, including a variety of special purpose districts such as fire districts, ports, water and sewer districts, conservation districts, health districts, public facility districts, library districts, irrigation districts, aging

and mental health districts, park and recreation districts, weed districts, clean air districts, mosquito control districts, diking and drainage districts, public development districts, and cemetery districts. WGEP retains attorneys to assist its members with legal issues including general liability, automotive liability, property damage, employment matters, and other issues common to public agencies. WGEP and its members, like the other Amici, have a strong interest in the protection of their work product from public disclosure in response to a records request.

III. STATEMENT OF THE CASE

The Amici adopt Respondent's Statement of the Case.

IV. ISSUES OF CONCERN TO AMICI

Public agency work product, created in the context of anticipated or actual litigation, should be protected on the same basis as the protection afforded to all other entities. Public agency work product should not be subject to public disclosure where a requestor merely alleges some "need" for the material. Public bodies are authorized to employ RCW 42.56.540 as a necessary tool to obtain judicial clarification of the application of an exemption. These positions are supported by well-reasoned authorities and sound public policy considerations.

VI. DISCUSSION

A. The Showing Required to Compel Work Product Cannot Be Made In the Context of a PDA Request.

Washington public agencies are entitled to withhold from public disclosure materials created in anticipation of litigation. RCW 42.17.310(1). This work product is not subject to disclosure where a requestor merely alleges that it has some unspecified "need" for the materials. The showing required to defeat work product protection requires that a party to a lawsuit demonstrate with specific facts a substantial need of the withheld material for the preparation of its legal claims or defenses, circumstances not presented by a public records request. The protection for public agency work product comports with sound public policy, and any erosion of that protection will have draconian consequences for our public agencies.

RCW 42.17.310(1)(j) exempts from disclosure those "[r]ecords which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery...." The controversy exemption is coextensive with the work product rule in CR 26(b)(4), and "[t]he exemption relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption." Limstrom v. Ladenburg, 136 Wn.2d

595, 605, 963 P.2d 869 (1998) (citing cases); see also Dawson v. Daly, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

The materials requested in this case were created by a school district, its representatives, and its counsel in anticipation of litigation arising from the death of a student. Cowles seeks to defeat the work product protection primarily by claiming that it "needs" the withheld material and is unable to obtain it elsewhere. This argument is misplaced. The PDA incorporates the work product doctrine as an exemption, but under normal circumstances a requestor cannot invoke the hardship exception to the work product rule.

Civil Rule 26(b)(4) allows a court to order disclosure of a party's protected work product, in the context of an active lawsuit, if the material is essential to the seeking party's ability to prove its claims, and if that party cannot obtain the information from other sources. Undeniably, the showing required in civil litigation to defeat work product protection requires both a party and the preparation of a case, neither of which apply in the context of a PDA request. Specifically, CR 26(b)(4) provides in relevant part that a "***party*** may obtain discovery" of work product "only upon a showing that the party seeking discovery has ***substantial need of the materials in the preparation of his case*** and that he is unable without undue hardship to obtain the substantial equivalent of the materials by

other means." A requestor, who is not a party to litigation with the public agency for the purpose of evaluating the request, by definition cannot demonstrate that the requested material is necessary "to the preparation of his case."[1]

The work product protection in CR 26(b)(4) was designed to protect a party's preparation for litigation, with a narrow provision for disclosure when no other source of information on a critical aspect of a claim is available to another party embroiled in that lawsuit. Where an individual has need of another party's work product for the preparation of a court case, the individual can make the required showing in the context of that pending lawsuit, with subpoena powers available to compel material from third parties if necessary. Without a lawsuit, the provisions allowing for disclosure of a party's work product simply do not apply.

B. Even if CR 26(b)(4)'s Exception for the Disclosure of Work Product Applies to a PDA Request, it Cannot be Invoked by a Requestor's Bare Allegation of "Need".

Even if CR 26(b)'s provision for the compelled disclosure of work product may apply in some contexts to a PDA request, there must be some

[1] To the extent that Limstrom suggests that a PDA requestor might defeat work product by showing substantial need of the material, the reference is dicta. See 136 Wn.2d 614-15 (by definition, requestor could not demonstrate a substantial need for materials he had already obtained from other sources). See also Kleven v. King County Prosecutor, 112 Wn. App. 18, 25, 53 P.3d 516 (2002) (PDA request for work product material was without merit where allegation of need was merely that requestor did not already have the documents).

specific showing of need by the requestor[2] beyond the general assertion of a right to information about the conduct of government business. Here, Cowles seeks the wholesale disclosure of work product,[3] material that could damage the vital functions of government if subject to disclosure, by simply alleging that it needs the materials. This is inconsistent with the language of the work product rule and intent of the PDA.

For example, public agencies may not normally distinguish between requestors or inquire as to the purpose of a request. This precludes the inquiry that Cowles urges here – the public agency's evaluation of a requestor's "need" for the material requested. There is no authority for treating requestors differently based upon their asserted "need" for public records. Such an undertaking is fundamentally contrary to the PDA.

Cowles offered no evidence in the trial court that would merit compelled disclosure of work product. Its bare allegation that it "needs" the material would not satisfy the CR 26(b) standard in any judicial

---

[2] Some briefing before this Court suggests that it is the agency that bears the burden of disproving the "need" requirement. Requiring a public agency to prove facts solely within the control of the requesting party is untenable.

[3] While the attorney-client communication privilege was at issue in prior stages of this case, the Court of Appeals decision is not based on that privilege. Any discussion of the attorney-client privilege is dicta in the opinion below. Likewise, Cowles' Petition for Review did not seek review of any attorney-client communication privilege issues.

proceeding. Thus, this Court need not reach the issue of whether and how the CR 26(b)(4) exception for compelled disclosure of work product applies in the context of a PDA request. Any standard for the application of the work product exceptions should be articulated, if ever, upon facts that fairly present a specific need for exempt material.

C. The Consequences of Eroding Work Product Protection for Public Agencies Would Be Debilitating.

The maintenance of work product protection is essential to the public agencies represented by Amici. Amici have a broad range of experience with regard to potential claims against public agencies. Requiring the disclosure of work product will damage the ability of public agencies to conduct litigation and settlement negotiations in the best interests of the public. As this Court has recognized, "[t]he general purpose of the exemptions to the Act's broad mandate of disclosure is to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government." Limstrom, 136 Wn.2d at 607 (citing cases). Work product protection secures for public agencies the same ability that private litigants enjoy to investigate potential claims, evaluate potential risk and exposure, assess settlement positions, and defend lawsuits.

The disclosure of a public agency's factual investigation and legal analysis of potential claims is not in the public interest. It is an unfortunate reality that public entities are faced regularly with claims. As with any form of anticipated litigation, public agencies often engage attorneys to advise them about the strengths and weaknesses of a claim before they take action. To require disclosure of this material would necessarily allow the adverse party free access to the public agency's legal strategy and impair the ability of the agency to fairly address or contest the issues. For example, one amicus insures numerous school districts, educational service districts, and cooperatives. The amicus provides coverage for the defense of special education hearings and retains attorneys to assist school districts in these cases. Parents of such students are often represented by attorneys in hearings against the school district. If documents prepared in anticipation of these administrative processes are disclosed, they give the party adverse to the school district an unfair advantage, negatively affecting the ability of the amicus' member districts to defend themselves.

Pre-litigation investigations are important to public agencies. In many cases, an accident or other unexpected event will naturally give rise to anticipated claims and litigation. A public agency will often take a careful approach and conduct a prompt investigation and begin to evaluate

potential claims. This is classic work product activity. For example, one Amicus Risk Pool and its county member are evaluating potential wrongful death claims arising from a recent driving accident. To help assess the potential claims, they retained an attorney to investigate the incident and advise them on the legal issues presented. No claim or lawsuit has been filed, and years remain before the statute of limitations runs. As with most potential claims, the agency does not know with certainty whether the matter will ever proceed to litigation.

Similarly, in disputes over employee terminations, public agencies often initiate an internal investigation in anticipation of potential litigation long before any termination is litigated. Risk Pools frequently retain an attorney to conduct an investigation and then rely upon the attorney's work product to defend against any subsequent claims. Anticipated litigation over personnel issues may take years to develop into actual litigation, if at all. It is in the public interest for agencies to promptly investigate and evaluate claims – rather than wait until a lawsuit is filed. If this material is not protected, there is little incentive for an agency to do so.

Investigatory work product frequently forms the basis of a litigation strategy. In a recent case involving the near drowning of a nine-year-old at a public swimming pool, one amicus retained an attorney to

conduct an investigation on behalf of its parks and recreation district member. The attorney advised the Risk Pool and its member on potential claims. His work product was used later in the defense of a claim for damages. In another case, two minors, both intoxicated, were injured in an auto accident. Again, a Risk Pool Amicus retained an attorney to conduct an investigation and advise about potential claims. Substantial work product was generated and later used in the defense of two lawsuits. Likewise, in an incident involving allegations of student-on-student racial discrimination, another Risk Pool Amicus retained an attorney to conduct a pre-loss investigation and advise on potential legal claims available to the victim's family against the school district member. In this matter, the attorney's work product was used to defend the district in a later lawsuit.

Work product is not limited to attorney-conducted investigations. In some cases, technical expertise is an essential part of evaluating a claim. In a matter involving an illness and death in a county jail, an Amicus Risk Pool and its county member retained a medical expert to conduct an investigation in anticipation of potential wrongful death claims. In that case, the county and Risk Pool needed the expert's specialized knowledge in order to assess properly the potential claims and any settlement value that a suit would have. The expert's materials were developed as a part of the legal strategy, and the work product doctrine

protects such analysis. Indeed, in the subsequent litigation over that matter, plaintiff's counsel tried to compel disclosure of the expert's reports and related papers, and the court upheld the county's work product claims. In that matter, as with almost all non-testifying expert evaluations, the work product doctrine allowed the county to assess properly a potential case without fear that its evaluation of the claims would be handed over to the other party.

The work product doctrine allows a public agency to litigate on a level playing field with a private party on the other side. This is the right result: any erosion of the work product doctrine correspondingly erodes the agency's ability to defend against claims. For example, in a recent matter involving an Amicus and its city member, an adolescent girl fell into a shallow creek while trespassing on a city-owned railroad trestle. The subsequent lawsuit generated substantial work product, including investigations, case exposure and reserving analysis, trial preparation reports, and mediation strategy materials. Disclosure of these files would have fully compromised any defense capability.

Some high profile litigation involving public entities are complex, involving multiple parties and suits. For example, one Risk Pool Amicus has worked to resolve over three dozen individual claims and lawsuits against a city, some of which are still awaiting trial, all related to the city's

police department investigations. Volumes of work product have been created during the course of that litigation and continue to be generated in defense of these cases. The matters, litigated for over 13 years, have cost millions of dollars to defend. The financial exposure for public agencies would only increase if the city could not seek and obtain candid legal advice from an attorney about the merits and potential settlement value of specific claims. Public expenses would increase exponentially if attorneys for public agencies could not work on litigation without constant disclosure of strategy, fact investigation, and legal analysis.[4] Protections afforded work product protect taxpayer assets.

All Amici have an interest in protecting work product. WASA members who serve as school administrators and AWC cities must evaluate potential claims and conduct litigation in the best interests of the public that they serve. The attorney members of WCSA must be able to give school districts candid advice and assist in the preparation of a defense or work toward settlement of the claims. Likewise, WSRMP, SWRMIC, WCRP, AWC RMS, WCIA, WSRP, PURM, WGEP, and the attorneys they retain for their members must be able to conduct

[4] Compounding the problem of public disclosure of work product is how disclosed attorney-authored materials would be treated in the litigation itself. For instance, attorney analysis of the weakness of a particular defense could be argued by the recipient as a party admission in certain contexts. This is untenable.

investigations and candidly assess the legal strengths and weaknesses of a case without handing out to the public, including plaintiff's attorney, a roadmap of their case strategies or settlement evaluations.

"The work product exemption not only protects the interests of individuals, but also promotes and protects the effectiveness of our adversarial judicial system." Limstrom, 136 Wn.2d at 607-08 (internal citations omitted). As a matter of sound public policy, agencies must be able to investigate confidentially the basis for potential litigation and develop legal defense and settlement strategy without concern that the resulting materials will be disclosed. The release of work product would provide perverse incentives to agencies not to investigate promptly potential claims or to seek legal advice. The likely result of such a rule would be that written investigation reports and claims analysis would become less frequent, in favor of less efficient oral reports. This will only increase legal costs, and would not serve in the public interest.

D. Government Entities Must Be Able To Obtain Judicial Rulings Regarding the Application of PDA Exemptions.

Washington courts may enjoin the examination of any record upon motion by a public agency. RCW 42.56.450. Cowles argues that this provision may not be used by an agency to initiate suit. This argument

contradicts the statutory language, authority interpreting it, and the actual practice of public agencies.

The Attorney General's model rules concerning PDA requests anticipate that public agencies may use the injunction provision in RCW 42.56.540 to initiate judicial action regarding the application of exemptions. See WAC 44-14-08004(5)(c). The Attorney General lists three means of obtaining judicial review. The third describes the injunction provision, and states that an "action under this statue can be initiated by the agency...." See also Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws (2006 WSBA CLE) § 17.4(6) at 17-17 (referencing use of provision by agencies). The Attorney General's model rules – and the conduct of countless public agencies – have interpreted and applied this provision to allow an agency to seek a judicial clarification about whether a particular record must be released to a requestor.

Litigation over public records requests is not an unusual occurrence. For example, while WCSA itself has not been a party to litigation concerning the scope or application of PDA exemptions, its member attorneys have litigated such suits on behalf of their school district clients. Likewise, WCRP has supported the defense of several Public Records Act suits against its members. Because public agencies

are subject to fee awards and daily penalties for any mistake about the scope and application of an exemption, agencies must be afforded the same right to go before a judge and ask for clarity about a specific exemption's application. See, e.g., Armen Yousoufian v. Office of Ron Sims et al, -- Wn. App. --, -- P.3d -- (Div. I, February 5, 2007) (remanding case for recalculation of daily penalty fees). Because the daily penalty continues to accrue, even during the pendency of litigation, until a nonexempt record is actually produced,[5] public agencies have a significant interest in obtaining a prompt judicial review. Initiating the litigation is one method to ensure that review and to curb the accumulation of penalties.

Cowles argues that the provision sets out an additional burden for public agencies seeking to prevent disclosure if they initiate suit. That position is baseless. As this Court has explained, the section "is simply an injunction statute.

It is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records if they fall within *specific* exemptions found elsewhere in the Act. Stated another way, section .330 governs access to a remedy, not the substantive basis for that remedy."

---

[5] Koenig v. City of Des Moines, 158 Wn.2d 173, 188, 142 P.3d 162, 168 (2006).

Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 257-8, 884 P.2d 592 (1994) (emphasis in original).

RCW 42.56.540 is a valuable tool for agencies who need clarification of the application of an exemption and have been unable to amicably resolve the issue with the requestor. Contrary to Cowles' suggestion, the requestor is hardly a victim in this process – the requestor can generally moot the lawsuit by withdrawing the disputed aspects of the request. There is no evidence in the record that public agencies are abusing their right to initiate judicial review of exemption determinations, and there are many practical checks (both financial and political) that suggest such abuse is unlikely. In the absence of any evidence of abuse and in light of the policy reasons in favor of the provision, Amici urge the Court to confirm that RCW 42.56.540 is available to public agencies as well as private parties as a means of initiating suit.

VII. CONCLUSION

Written materials developed by a public agency and its attorneys in anticipation of litigation should not be subject to disclosure to anyone who asks for them, where the requester claims to "need" the material. Likewise, the availability of RCW 42.56.540 to agencies that need judicial clarification of an exemption's specific application is an important

procedural right that balances against the daily penalties to which agencies may be subject. The decisions below should be affirmed.

Respectfully submitted, this 16th day of February, 2007.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP

By Grace T. Yuan

Grace T. Yuan, WSBA # 20611
Laura K. Clinton, WSBA # 29846
Attorneys for Amicus Curiae
the Washington Schools Risk
Management Pool, *et al.*

K:\24131\00010\LKC\LKC_P21YD